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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 673

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian ad litem, and ERMINO SCOCOZZA,

Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William J. Dempsey.
ROBERT MCGOWAN SMITH,
Attorney for Petitioners-Appellants.

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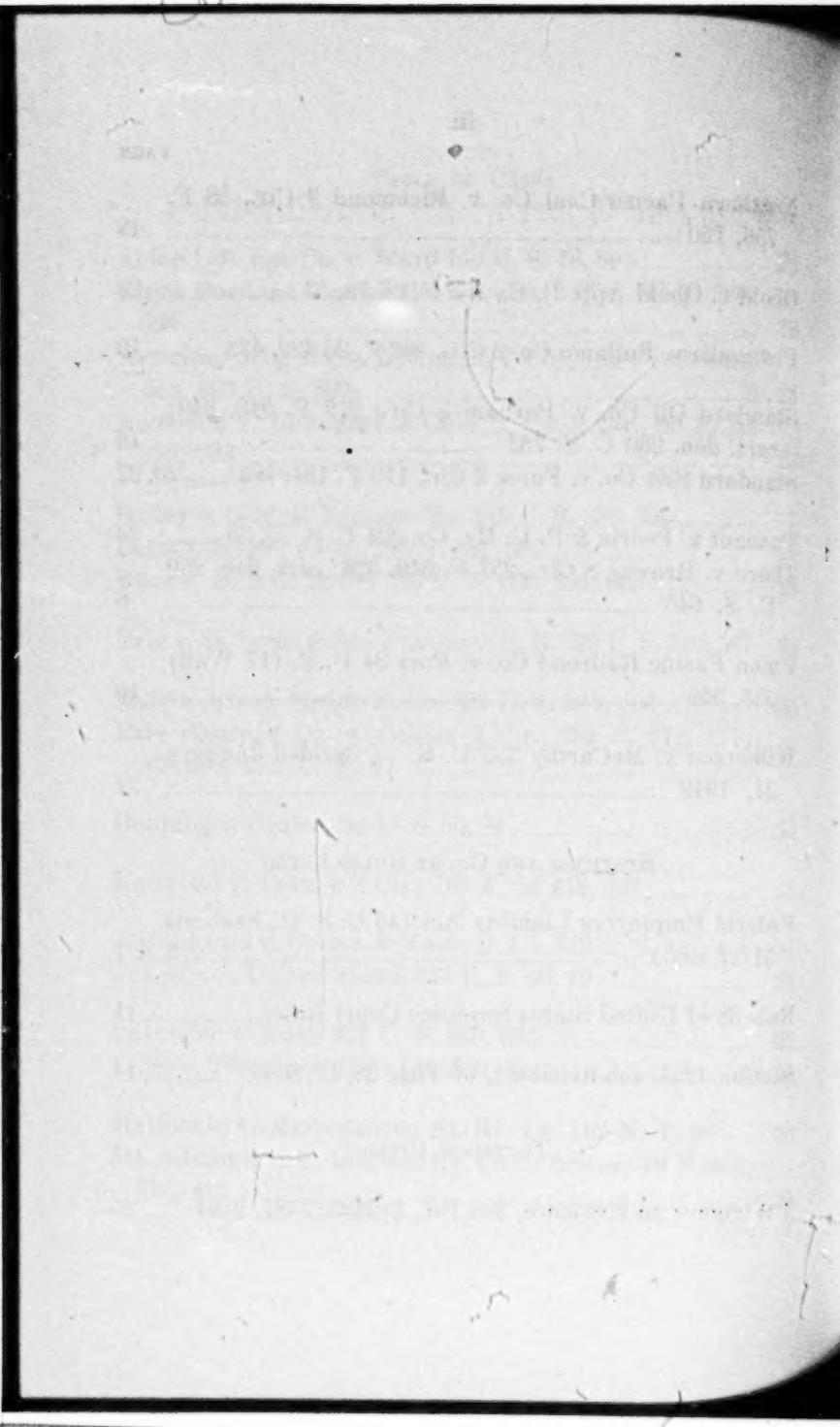

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Anthony Scocozza, by his guardian ad litem, Ermino Scocozza, and Ermino Scocozza, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on the 6th day of January, 1949, which judgment affirmed the judgment of the United States District Court for the Southern District of New York directing a verdict in favor of respondent in an action by petitioners to recover for personal injuries and medical expenses under

the Federal Employers Liability Act. Your petitioners represent to the Court as follows:

FIRST: The complaint contains two causes of action. The first cause of action seeks to recover damages for personal injuries sustained by the infant petitioner,[1] Anthony Scocozza, who was, at the time of sustaining such injuries, an employee of the respondent railroad (4, 5, 6).[2] The second cause of action seeks to recover damages for medical expenses incurred and loss of services sustained by the petitioner Ermino Scocozza, the father of Anthony (6, 7).

SECOND: The respondent's answer admitted that petitioner was in respondent's employ at the time of the accident but denied liability on account of his injuries. By way of affirmative defense the answer pleaded the alleged negligence of petitioner and asserted further that, at the time of the accident, petitioner was not engaged in the employ of respondent in the furtherance of interstate commerce (9, 10).

THIRD: The case was tried before Honorable J. Waties Waring, District Judge, and a jury on the 15th, 16th and 17th days of March, 1948.

FOURTH: The proof, very briefly, showed the following:[3] Petitioner, at the time of the accident on October 21, 1943, was sixteen years of age and had been employed for a short time as a machinist's helper in the Erie Railroad Roundhouse in Jersey City, New Jersey (12, 13, 14, 52).

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1 The infant petitioner will hereafter be referred to as "petitioner."

2 Numerals in parentheses refer to pages of the record in the Court of Appeals unless otherwise indicated.

3 Additional items of evidence will be referred to in the brief.

As a machinist's helper, petitioner worked for the witness, Eugene Gigli, who was a machinist (14, 52). Gigli's duties were to make repairs on locomotives that came off the line into the roundhouse (63, 66, 67); petitioner's duties as helper were to assist Gigli in his work and generally to do as the latter told him (53, 63, 111, 112).

Between seven and nine o'clock in the morning of the day of the accident, 69 locomotives had come off the road into the roundhouse for repairs and Gigli and his helper, the petitioner, had been assigned to work on one of them (67, 111, 113).

About 9:30 A. M., petitioner testified, he saw engine 2527 being moved into position on a track outside the roundhouse. This locomotive had steam up and was to go right out again after repairs had been made (15, 29, 48). Gigli told petitioner that he was going into the roundhouse to sharpen a chisel and instructed petitioner, during his absence, to "check the nuts and bolts" on engine 2527 (39, 41). After Gigli left, petitioner started to check the nuts and bolts on the left front of engine 2527 by striking them with a hammer to find out if they were loose. He discovered one bolt that was stripped and loose and, not having a wrench, got a chisel to work with. As he was engaged in removing the nut and bolt, there was a sudden explosion as a result of which petitioner sustained injuries that resulted in the enucleation of his right eye (15, 16, 17, 32, 33, 39, 41, 44, 135).

Petitioner was completely unable to explain the cause of his misfortune. Immediately after the accident and under questioning by the company doctor who gave him first aid, petitioner stated that he had been "working on engine when something exploded" (78, Petitioner's Exhibit 2). The respondent's claim agent interviewed him in the hospital after his eye had been removed and, in the state-

ment then obtained from him, petitioner was unable to account for the accident (95, 96, 211, 213). And in answer to queries at the trial, petitioner could only reply that he did not know what it was that had exploded (16).

The doctor who removed petitioner's eye sectioned it and removed fragments therefrom. These fragments, together with others found in the petitioner's body, were turned over to the respondent's claim department (70, 120, 135, 221). At the trial respondent claimed that it had had these fragments analyzed and produced an expert witness who testified that they were composed approximately of 95% copper and 5% zinc, a composition known as gilding metal. Such metal, the witness said, is used chiefly in the fabrication of cheap jewelry and bullet jackets (121, 122, 146, 149, 150, 151, 162, 163). On that evidentiary basis, the witness gave it as his opinion that petitioner had been injured by the explosion of a small arms cartridge (158).

FIFTH: Respondent moved to dismiss the first cause of action upon two grounds: (1) that there was no proof of negligence on its part; and (2) that there was no proof that petitioner was engaged in respondent's employ in the furtherance of interstate commerce at the time of the accident (180).

After the Trial Court appeared to be in doubt as to whether petitioner had made out a case on the interstate commerce issue (182), counsel for petitioner offered to reopen the case and introduce additional evidence on that point (186). The Trial Court said that, if it were going to decide the motion in question on the interstate commerce issue, it would certainly permit petitioner to put in additional testimony but that it was going to direct a verdict on the issue of respondent's negligence (186). While it was not sure, the Court said, that respondent's explana-

tion of the accident was correct, nevertheless, it thought that petitioner's case was "utterly incredible" (188) and ruled that it would not submit the case to the jury because, if the jury found for petitioner, the Court would set aside the verdict (189).

The motion to direct a verdict on the second cause of action was granted on the ground that there was no proof that petitioner's father had incurred any medical expenses —the Erie had paid all such expenses—or that his father supported him (184, 185).

On that basis the complaint was dismissed in its entirety.

SIXTH: From the resulting judgment for respondent, petitioners appealed to the United States Court of Appeals for the Second Circuit. On January 6, 1949 that Court affirmed the judgment appealed from.

SEVENTH: This petition seeks a review of the judgment of the Court of Appeals affirming the judgment of the District Court in favor of respondent.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the provisions of the Federal Employers Liability Act (45 U. S. C., Sections 51 *et seq.*).

The jurisdiction of this Court is invoked under Section 1254, subdivision 1, of Title 28, U. S. C. and Rule 38 of the Rules of this Court.

Opinions Below

No formal opinion was rendered by the District Court. The opinion of the Court of Appeals is reported in 171 F. (2d) 145. It appears in the certified copy of the record filed in the office of the Clerk of this Court and is printed as Appendix A, annexed to the brief in support of this petition.

Statement of the Matter Involved

The trial judge put out of the case the issue whether petitioner was engaged in interstate commerce at the time of the accident (186). If the court had regarded that issue as of decisive importance, petitioner, as he offered to do, could easily have remedied any defect in his proof. The trial judge, indeed, conceded that petitioner was in a position to remedy any such defect but refused him the opportunity solely because the judge thought that there was no proof of negligence (186). In these circumstances, if the judgment for respondent cannot be sustained on the ground adopted by the trial court, it cannot be sustained on the ground of lack of proof with respect to the interstate commerce issue.

> *Thorn* v. *Browne*, 8 Cir., 257 F. 519, 528; cert. den. 250 U. S. 645.

Contributory negligence on the part of the petitioner would not, of course, bar his recovery (45 U. S. C., Section 53). Consequently, the first issue in the case is whether the proof herein made out a question of fact for the jury. The second issue is raised by the opinion of the Court of Appeals herein in which that court laid down the following

rule regarding the quantum of proof required to make out a *prima facie* case; viz., that, "The requirement that conflicts in the evidence be resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of the jury could, with reason, decide that the plaintiff's alleged cause of action was proved by evidence which outweighed at least a little all that was to the contrary."

Questions Presented

1. Whether the proof in the record herein made out a question of fact for the jury;

2. Whether the Court of Appeals was right in formulating its rule regarding the quantum of proof required to make out a *prima facie* case of negligence in an action under the Federal Employers Liability Act.

Reasons for Granting the Writ

1. This Court has said with regard to taking from the jury the issues of fact in suits by workingmen under the Federal Employers Liability Act that; "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." (*Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354.) As the annexed brief attempts to demonstrate, the proof in the present case presented questions of fact for the jury on the issue of respondent's negligence. Consequently, the direction of a verdict against petitioner raises a substantial question of law justifying review by this Court.

2. This Court has repeatedly held that, upon a respondent's motion for a directed verdict in a jury case, questions of credibility are to be resolved in the petitioner's favor and that the only test is whether, looking only to the evidence tending to support the petitioner's case, that evidence is sufficient to go to the jury. The Court of Appeals in the present case has based its conclusion upon grounds wholly contrary to the decisions of this Court, holding that the credibility of a petitioner's testimony must be weighed against the other evidence in the case and that the petitioner cannot go to the jury unless he has, in effect, proved his case by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

ROBERT MCGOWAN SMITH,
Attorney for Petitioner.

Dated: Brooklyn, New York
March 24, 1949.

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

Anthony Scocozza and Ermino Scocozza, each being severally duly sworn, depose and say that they are the petitioners herein; that they have read the foregoing petition and know the contents thereof, and that the same is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief and, as to those matters, they believe it to be true.

ANTHONY SCOCOZZA

ERMINO SCOCOZZA

Sworn to before me, this
24th day of March, 1949.

FRANCIS J. MCLAUGHLIN
Notary Public State of New York
Residing in Kings County
Kings Co. Clk's No. 141; Reg. No. 134 Mc 9
Commission expires March 30, 1949

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition for certiorari should be granted.

ROBERT MCGOWAN SMITH,
Attorney for Petitioners.

Dated: Brooklyn, New York
March 24, 1949.

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Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals is reported in 171 F. (2d) 145 and a copy is annexed to the petition herein and marked Exhibit A.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254, subdivision 1, of Title 28, U. S. C. and Rule 38 of the Rules of this Court.

Statement

Petitioners appeal from a final judgment (226), entered on March 17, 1948, in favor of respondent. The case was tried before Honorable J. Waties Waring, United States District Judge, sitting in the Southern District of New York, and a jury, on March 15, 16, and 17, 1948 (1). At the close of all the evidence the trial judge directed a verdict (185, 190) in favor of respondent on both causes of action contained in the complaint.

Facts

In view of the holding of the Court of Appeals that the petitioner's testimony was completely overcome by the other evidence in the case, counsel for petitioner respectfully asks that the Court indulge his following full statement of the proof adduced at the trial.

The accident occurred at about 10 AM on October 21, 1943 (14). At the time petitioner was sixteen years of age and had been working for respondent railroad for somewhat less than nine months (12, 24). Prior to that time he had been employed for a few months as an usher in a theatre (22, 23).

Petitioner's first job with the Erie was working in the coal pit; later he was assigned to lubricate the locomotives (13). Thereafter, and for a short time prior to the accident, he worked as a machinist's helper and was so engaged at the time of his injuries (14, 52). His place of employment was in the Erie Railroad Roundhouse in Jersey City (13, 14, 52).

As a machinist's helper petitioner worked for the witness, Eugene Gigli, who was a machinist (14, 52). Gigli was

required to make repairs on locomotives in the roundhouse (63, 66, 67). Petitioner's duties as helper were to assist Gigli in his work and to do as the latter told him (53, 63, 111, 112). Gigli testified that petitioner was "a good boy" and "a good helper" and that he was trying to learn how to use the tools (53, 62) but that he liked to play with and experiment with the tools, such as hitting things with the hammer and chisel or trying to put a 7/8 inch wrench on a one and a quarter inch nut (52, 53, 62).

On the day of the accident 69 locomotives had come off the road into the roundhouse for repairs between 7 and 9 o'clock in the morning and Gigli and his helper, the petitioner, had been assigned to work on one of them (67, 111, 113).

Petitioner testified that he had come on the job that morning at 8 o'clock (14). About 9:30 he saw a locomotive—the number of which was 2527—being moved into a position on a track outside the roundhouse. The engine had steam up and was hot and was to go right out again after repairs had been made (15, 29, 48).

Gigli told petitioner, according to the latter, that he was going to the roundhouse to sharpen a chisel and instructed petitioner, during his absence, to "check the nuts and bolts" on engine 2527 (39, 41). After Gigli went inside the roundhouse, petitioner put his tools on the platform on the front of the locomotive and proceeded to check the nuts and bolts on the left front of the engine, as Gigli had directed (15, 16, 33, 39, 41).

Another locomotive stood in front of 2527 but the two were not coupled together. No one was aboard 2527 and there was no one else near either locomotive (41, 47).

Petitioner checked the bolts by striking them with a hammer to see if any were loose (16, 32). He found one bolt that was stripped and loose and, not having a wrench, got

a chisel to work with (16, 33). As petitioner was endeavoring to remove the nut and bolt to replace them with new ones, there was a sudden explosion, petitioner was knocked to the ground and became unconscious for a few minutes 16, 44). Then one or more fellow workmen helped him to go, first, into the roundhouse to the supervisor and, thereafter, to the first aid station (16, 17). Petitioner was bleeding from the head and chest and could not see out of one eye (17).

The witness John F. Moriarty was in the first aid station when petitioner was brought there. He was a physician retained and paid by the respondent railroad company (68, 69, 73, 74). The minute that petitioner was brought into the first aid room, Dr. Moriarty asked him what had happened to him and petitioner stated, according to the doctor's testimony, that he had been (78, Petitioner's Exhibit 2) "working on engine when something exploded." In answer to queries at the trial whether it was the bolt or the chisel that had shattered, petitioner could only reply that he did not know what it was that had exploded (16).

Petitioner was taken from the first aid station to St. Francis Hospital where, on the following day, his right eye was removed (17, 135).

He had received no powder burns (79, 80, 81) but did have a number of large black scars on his face, chest and hands (19). Although Dr. Moriarty had made no notes with reference to these black scars, he admitted that pieces of metal covered with carbon or coal dust frequently leave dark scars and that the thing that caused petitioner's scars might well have been covered with coal dust and ashes (82).

Within five days after petitioner's eye had been removed and while he was still confined to bed, a statement was obtained from him by the Erie Railroad Claim Department (118, 119). Permission for the interview was obtained by

the Erie Railroad claim agent from Dr. Moriarty, the Erie's doctor (71, 74) but the boy's parents were not consulted (129). At the trial petitioner testified that he did not remember the interview and the hospital record contained an order prescribing morphine for petitioner on October 27, 1943, the day of the interview (75, 76, 139, Plaintiff's Exhibit 1). The doctors who testified for the railroad claimed that no morphine was given after October 22nd and that either the date on the order in question was wrong or counsel for petitioner was misreading it (84, 85, 86, 135, 136).

In this interview with the Erie claim agent, petitioner said in substance, according to the notes made by a court stenographer, that, at the time of the accident, he was hammering on a nut to smooth it down and had not been told to do so (95, 96).

The doctor who had taken out petitioner's eye, sectioned it and removed fragments therefrom. These fragments, together with others found in petitioner's body, were turned over by the railroad's doctors to the railroad's claim department (70, 120, 135).

The respondent's evidence tended to show, first of all, that the locomotive, on which petitioner had been working at the time of the accident, had been in storage for 12 days beforehand and remained in storage for almost a year afterwards (55, 56, 60, 61, 104, 105). Secondly, respondent's evidence showed the following with regard to the cause of petitioner's injuries.

Eugene Gigli, who was not an eyewitness of the accident, testified that, about a month thereafter, petitioner told him that he had been "playing with two inch and a quarter nuts" and "all of a sudden they exploded" (58, 59).

Florentino Gallo, a machinist's helper, employed by the respondent for thirty years, also testified for the defense

(87, 88). His testimony was that he was standing one or two feet away from petitioner when the latter was injured by the explosion of a "fuse". By a "fuse" he meant the kind of fuse that is used in a lead box (89, 130). After the explosion, the witness continued, he saw some pieces that looked like bronze or copper lying on the ground but there were no marks of any burns. The fragments were picked up by Mr. Gardiner, respondent's general foreman (89, 90, 91, 92).

Eugene Gigli, who said he came on the scene ten minutes after the accident, saw these particles lying on the ground and said that he also noticed a dent, with a copper particle in it, in the rear of engine 2552, the locomotive that stood in front of 2527 (57, 58). Mr. Gardiner, respondent's general manager, picked up the copper particles and put them in his pocket (57).

Jeremiah Driscoll, respondent's master mechanic at the Jersey City Roundhouse (102), also arrived on the scene after the accident. He testified that he saw the metallic particles on the ground and also a 1/8 inch dent punched into the rear of locomotive 2522. The tank of the locomotive, he said, is as hard as steel and the dent indicated that some object had hit the tank because the dent was not there originally (107, 108).

The fragments from petitioner's eye and body which had been turned over by the doctors to the respondent's claim department were sent to a laboratory for analysis (121, 122). An expert witness produced by respondent at the trial testified that the fragments were composed of approximately 95 per cent copper and approximately 5 per cent zinc, a composition known as gilding metal (146). Such metal, he said, is employed chiefly in the fabrication of cheap jewelry and bullet jackets (149). By the term, "bullet jacket," the witness meant the metal casing enclosing a lead

core, which is the projectile or tip of the bullet, the projectile being the solid piece of metal that is propelled forward by the explosion of the cartridge (150, 151, 162, 163). On the basis of the foregoing, the witness gave it as his opinion that petitioner was injured by the explosion of a small arms cartridge (158).

One of the doctors who testified for respondent admitted, however, on cross-examination, that if petitioner had exploded a bullet, as claimed by defendant, he would probably have sustained powder burns. This medical witness said (80); "I would expect to find some powder burns if the explosion * * * well, you would probably expect to find powder burns."

POINT I

The record presents questions of fact that should have been submitted to the jury.

"A"

The Respondent was Negligent

Petitioner's proof shows the following facts with regard to respondent's negligence:

(1) Petitioner was a boy of sixteen, with no mechanical training and almost no business experience (12, 13, 14, 22, 23, 24, 52);

(2) This boy was employed by respondent in its yards (13, 14, 52); in these yards as many as 69 locomotives at one time came off the line for immediate repairs (111, 113);

(3) Petitioner was completely unfamiliar with his job and was only beginning to learn to use tools; instead of

using these tools properly, he would experiment with them and play with them (52, 53, 62);

(4) Petitioners' immediate boss, Gigli, knew of his unfamiliarity with his job and cautioned him about the use of tools (53);

(5) Despite his knowledge of petitioner's inexperience and youthful propensity for mischief, Gigli, on the day of the accident, ordered him to work alone on a locomotive that required immediate repairs (39, 41);

(6) Gigli left petitioner alone and without superintendence in the railroad yards while the youth was engaged in that work (15, 16, 33, 39, 41);

(7) The place where petitioner was ordered to work presented a latent peril that was not obvious to him (89, 90);

(8) Petitioner placed his tools on the front of engine 2527 and, while he was working on the left front of the engine, an explosion occurred, causing the injury complained of (16, 32, 33, 44).

The evidence summarized above, it is respectfully submitted, created questions of fact with regard to respondent's negligence.

Respondent owed a two-fold obligation to its youthful employee. For one thing, its obligation to provide him with a safe place to work is measured by petitioner's age and experience. Where an employer requires immature and inexperienced workmen to perform duties in places that are dangerous for such immature and inexperienced per-

sons, the employer may he held liable for injuries received by such employees on account of the character of the premises.

Alpha Portland Cement Co. v. *Curzi* 2 Cir., 211 F. 580, 584
See also *Standard Oil Co.* v. *Parham* 5 Cir., 279 F. 945, 949; cert. den. 260 U. S. 733
Pieczonka v. *Pullman Co.* 2 Cir., 102 F. 2d 432, 433

Beyond that, moreover, respondent owed the youthful and inexperienced petitioner a duty not to impose on him tasks that were beyond his powers and the execution of which involved hazards against which petitioner was not capable of protecting himself. Gigli, of course, stood in the position of vice-principal to petitioner and his direction to the latter to perform, alone and without superintendence, tasks that brought him into a position of danger is chargeable to the respondent employer.

Union Pacific Railroad Co. v. *Fort* 84 U. S. (17 Wall) 553, 558
Northern Pacific Coal Co. v. *Richmond* 9 Cir., 58 F. 756, 760
Betts v. *Bisher* 9 Cir., 213 F. 581, 586

The same principle is applicable in all cases where the injured employee is under an incapacity, due to age, sex, mentality, inexperience, etc., that leaves him open to injury in the place or in the capacity in which he is employed by his master.

Lillie v. *Thompson* 332 U. S. 459
Blair v. *B. & O. R. Co.* 323 U. S. 600, 604, 605

American Mfg. Co. v. *Zulkowski* 2 Cir., 185 F. 42, cert. den. 220 U. S. 609
Standard Silk Co. v. *Force* 2 Cir., 170 F. 184, 186
Erie Railroad Co. v. *Collins* 2 Cir., 259 F. 172, 177; affirmed 253 U. S. 77

"B"

Respondent's Negligence was the Proximate Cause of Petitioner's Injuries

Petitioner was unable to explain the precise cause of his injuries. In that testimony he was entirely honest, as the record shows. Thus immediately after the accident, when he was taken into respondent's first aid station for help and under questioning by respondent's doctor, he could only say that he had been "working on engine when something exploded" (78 Petitioner's Exhibit 2). A month after the accident he is supposed to have told Gigli that he had been playing with two one inch and a quarter nuts which suddenly exploded (58, 59). If that statement were, in truth, made by petitioner, this completely absurd explanation of his misfortune amply demonstrates that the youth was utterly bewildered as to the cause of his accident.

That honest inability to explain the reason for his misfortune does not bar petitioner from a recovery. First of all, it is undeniable that respondent's negligence in employing an immature and inexperienced boy of 16 in its railroad yards and its requiring this boy to perform, without superintendence, tasks that exposed him to latent dangers, contributed, at least in part, to petitioner's injuries. That alone would make respondent liable to respond in damages.

Lillie v. *Thompson* 332 U. S. 459, 462
Ellis v. *Union Pacific R. Co.* 329 U. S. 649, 653
Henwood v. *Coburn* 8 Cir., 165 F. 2d 418, 423

But, beyond that, an unexplained explosion in an employer's premises is an extraordinary occurrence from which a jury might properly draw an inference that it was caused by negligence.

See *Johnson* v. *United States* 333 U. S. 46, 49
Lavender v. *Kurn* 327 U. S. 645, 653

There were only two possible agencies that could have been the negligent cause of the accident. One such possible agency was the petitioner himself and, of course, it was respondent's theory that petitioner caused his own injury by exploding a bullet with a hammer and chisel. But, if the jury rejected that explanation—as it might properly do (see discussion under subpoint "C", *infra*)—the only other possible negligent agency was the respondent. The explosion took place on respondent's premises and, if its assertion of petitioner's negligence be rejected, the accident occurred when petitioner—put in a place of danger by respondent—inadvertently came into contact with a dangerous instrumentality or object therein, In that state of things, the respondent may be held liable.

Jesionowski v. *Boston & Maine R. Co.* 329 U. S. 452, 458
See *Johnson* v. *United States* 333 U. S. 46

"C"

Respondent's Explanation of the Accident was not Conclusive

Respondent, immediately upon the happening of the accident, put the petitioner in the hands of its own doctors. These doctors, after removing petitioner's eye, sectioned it without his consent and turned over the fragments found

in the eye to respondent's claim department. The fragments found in petitioner's body were also turned over by the doctors to the claim department (70, 120, 121, 122, 135, 146). These fragments were not produced by respondent until the trial.

Moreover, within a few days after the accident and while petitioner was still confined to his bed in the hospital—and perhaps, too, while he was under the influence of morphine (75, 76, 139, Petitioner's Exhibit 1)—the respondent's claim agent, accompanied by a court stenographer, and without notice to the boy's parents, confronted him alone in his hospital bed and obtained a statement from him (71, 74, 118, 119, 129).

Thereafter, at the trial, the respondent contended that petitioner had caused his own injuries by striking a bullet with a hammer and chisel, basing this theory upon the opinion testimony of a metallurgist under whose direction the fragments taken from petitioner's body had been analyzed.

That defense, of course, could be no more than a theory, because it was not based on direct evidence from eye-witnesses but only on a chain of circumstantial evidence. Its plausibility, therefore, was a question for the jury.

Standard Silk v. *Force* 2 Cir., 170 F. 184, 186

In addition, there are evident inconsistencies between respondent's theory and the record. For one thing, respondent's theory seems to assume that petitioner was hammering on engine 2552—in which a dent was found after the accident (57, 58, 107, 108)—whereas the testimony both of petitioner and of Gallo is that petitioner was hammering on engine 2527. Secondly respondent's theory supposes that the petitioner could explode a bullet at close range without suffering powder burns although there is testi-

mony in the record from respondent's own medical witness that powder burns would probably result (80). Finally, respondent's theory would require the Court to believe that the solid tip of a bullet would not only mushroom upon striking an object but would also shatter in fragments (163, 169). The effect of such expert testimony was, of course, not conclusive but was for the jury to evaluate.

Aetna Life Ins. Co. v. *Ward* 140 U. S. 76, 89
Anderson v. *Baltimore & Ohio R. Co.* 2 Cir., 96 F. 2d 796, 798
Obold v. *Obold* App. D. C., 163 F. 2d 32, 33

In *American Mfg. Co.* v. *Zulkowski,* 2 Cir. 185 F. 42, cert. den. 220 U. S. 609, the Court made an observation which is peculiarly applicable to the present case where the defense is that petitioner exploded a bullet with a hammer and chisel (see pp. 46-47 of 185 F.):

> "In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. Even the most ignorant laborer would know that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. And in support of his theory that the machine started automatically, the jury were justified in considering the improbability that he would do an act that would seem to impeach his sanity."

POINT II

The Court of Appeals erred in holding petitioner's proof insufficient.

In *Wilkerson* v. *McCarthy*, 335 U. S. , decided January 31, 1949, this Court said that: "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Moreover, this Court has repeatedly said that for the purposes of a motion to direct a verdict for the defendant, questions of credibility, like all other disputed questions of fact, are to be resolved in favor of the plaintiff.

Delk v. *St. Louis & San Francisco R. R.* 220 U. S. 580, 587
Gunning v. *Cooley* 381 U. S. 90, 94
Tennant v. *Peoria & P. U. Ry Co.* 321 U. S. 29, 35
Wilkerson v. *McCarthy, supra.*

In the instant case the Court of Appeals disregarded that principle in ruling that "the assertion of an interested party"—i.e., the petitioner herein—was alone insufficient to carry the issue of respondent's negligence to the jury when that testimony was opposed to what the Court termed "known facts and reasonable inferences drawn from them". Further the Court ruled that; "The requirement that conflicts in the evidence be resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of jury could, with reason, decide that the plaintiff's alleged cause

of action was proved by evidence which outweighed at least a little all that was proved to the contrary."

In so ruling, it is respectfully submitted, the Court of Appeals held that a plaintiff does not make out a *prima facie* case unless he proves his cause of action by a preponderance of the evidence. That ruling confuses the principles governing the quantum of proof necessary to go to the jury with the principle that a jury's verdict for one party or the other may be set aside where it is not in accord with the preponderance of the evidence. The former involves questions of law; the latter questions of fact. Each, moreover, entails different consequences; failure to make out a *prima facie* case justifies dismissal of the cause of action whereas failure to prove the cause of action by a preponderance of the evidence invites no more than the hazard of another trial.

9 Wigmore on Evidence, 3rd Ed., §§2485, 2487, 2494

Mt. Adams & E. P. Inclined Ry. Co. v. *Lowery* 74 F. 463, 476, 477

McDonald v. *Metropolitan St. Ry Co.* 167 N. Y. 66

This error was of decisive importance in the present case because, as the opinion of the Court of Appeals appears to concede, should the petitioner's proof herein be taken at its face value, the judgment dismissing the complaint must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Brooklyn, New York
March , 1949.

Respectfully submitted,

ROBERT MCGOWAN SMITH,
Attorney for Petitioners-Appellants.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian ad litem, and ERMINO SCOCOZZA,

Plaintiffs-Appellants,

—against—

ERIE RAILROAD COMPANY,

Defendant-Appellee.

Before:

L. HAND, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York. Affirmed.

CHASE, *Circuit Judge*:

At the close of all the evidence, a verdict was, on defendant's motion, directed for the defendant in this suit brought under the Federal Employers' Liability Act in the District Court for the Southern District of New York. This appeal is from the final judgment entered on that verdict and the only issue is whether there was enough evidence of the defendant's negligence to require the submission of that question to the jury.

The suit was brought by the father and guardian ad litem of a minor to recover damages for personal injuries to the minor who was accidently hurt while employed by the appellee as a mechanic's helper. The boy, nearly seventeen years old when the accident occurred, had been working for the appellee for about nine months and for a few months had been helping mechanics inspect and repair equipment. According to the plaintiff's testimony, he was told by his boss on the morning he was hurt to check the nuts on a steam locomotive which had been brought off the line for inspection and was standing with steam up on a track just outside a round house. The boss then left him to his task and went inside to sharpen a chisel.

What then happened to the boy is shown for the most part by his own testimony, which was all the evidence the plaintiff introduced. He testified that in checking the nuts on the engine by hitting them with a hammer he came to one which was different from the others in that it was "stripped loose" and he took it off. When asked, "How did you go about it?" he answered, "I went over and got a chisel and I hit it once or twice, and the third time something went off and I didn't know what hit me." He also said the nut was on a bolt which was attached, he thought, to some kind of a rod. On cross-examination he testified that the nut was a round one at the middle of the left side of the engine on a bolt which was there to hold something —what that was he didn't know. He said it was "one by one" in size and was the first nut he checked on the engine. He hit it with a hammer and "then it was loose." He said both that he couldn't get it off by hand and that he didn't try to unscrew it by hand. It, and the bolt it was on, looked like iron but he didn't know whether they were made of iron. The nut had grooves across the top.

Other evidence in the record shows that after he was hurt the boy was taken to a hospital where his left eye was removed and metal particles were taken from the eyeball and from his left hand. Tests of these particles showed that they were composed of a little over 95% copper, the remainder being mostly zinc and lead with traces of iron and other elements. Such material is known as gilding metal and is used mainly in making inexpensive jewelry and for covering the lead cores of bullets used in making small arms ammunition. There was no evidence that any such metal is used in or on this locomotive.

Still other evidence tended to show that when what he struck exploded the boy was hitting with a hammer some object on the front platform of the engine, instead of checking the nuts as he testified that he was told to do, and that that object was a small arms cartridge.

"The railroad is liable in this suit only if it was guilty of negligence which caused the accident. But the plaintiffs were entitled to have that issue submitted to the jury if the evidence, viewed in its light most favorable to them, was sufficient to make out a prima facie case. Randall v. Baltimore & Ohio R. Co., 109 U. S. 478; Delk v. St. Louis & San Francisco R., 220 U. S. 580; Gunning v. Cooley, 281 U. S. 90, Lavender & Kurn, 327 U. S. 645. This does not mean, however, that the assertion of an interested party is alone sufficient to carry the issue of the railroad's negligence to the jury when it is so opposed to known facts and reasonable inferences drawn from them that members of a jury could not fairly reconcile it with those established facts. Redman v. Baltimore & Carolina Line, Inc., 2 Cir., 70 F. 2d. 635, 637, modified on other grounds, 295 U. S. 654. The requirement that conflicts in the evidence be

resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of the jury could, with reason, decide that the plaintiff's alleged cause of action was proved by evidence which outweighed at least a little all that was to the contrary. Myers v. Reading Company, 331 U. S. 477. Applied to this case that means that before the Jury could lawfully return a verdict for the plaintiffs it had to be able to find not only that the boy's version of the cause of his injuries was the correct one but also that prudence required the defendant to foresee some likelihood that such an explosion as that described by him might occur and to take steps to protect the boy from such a danger. The defendant railroad was not an insurer, and there is nothing whatever in this record to show that it did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode. There was, therefore, insufficient evidence of negligence of the defendant on which to go to the jury. Brady v. Southern Ry. Co., 320 U. S. 476; Trust Co. of Chicago v. Erie R. Co., 7 Cir., 165 F. 2d. 806, cert. denied, 334 U. S. 845; Eckenrode v. Penn. R. R. Co., 335 U. S. 329 affirming, 3 Cir., 164 F. 2d. 996."

The direction of the verdict was accordingly, not erroneous. *Penn. R. R. Co.* v. *Chamberlain*, 228 U. S. 333; *Redman* v. *Baltimore & Carolina Line, Inc., supra.*

Judgment affirmed.

IN THE

Supreme Court of the United States

October Term—1948

No. 673

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian *ad litem*, and ERMINO SCOCOZZA,

Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CLEVELAND C. COBY,
Of Counsel.

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Opinions Below

The oral opinion of the District Court is printed in the Transcript of Record (190). The opinion of the Court of Appeals (231-233) is reported in 171 F. (2d) 745.

Jurisdiction

This Court's jurisdiction is invoked under Section 1254 (sub. 1) of Title 28, United States Code.

Question Presented

(1) The one question presented here is whether there is any evidence in this record upon which a jury could find negligence on the part of the respondent which contributed, in whole or in part, to the injuries sustained by the petitioner.

(2) The petitioner seeks to present a second question for review by this Court (Pet. p. 7) as to "Whether the Court of Appeals was right in formulating its rule regarding the quantum of proof required to make out a *prima facie* case of negligence in an action under the Federal Employers' Liability Act." He asserts (Pet. p. 8) that the Court of Appeals devised a new rule of independently resolving the credibility of petitioner's testimony in its unanimous affirmance of the judgment below. A reading of the opinion of the Court of Appeals will show the lack of merit in this contention. The Court of Appeals followed the law as laid down by this Court, citing such cases as *Lavender* v. *Kurn*, 327 U. S. 645; *Myers* v. *Reading Company*, 331 U. S. 477; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329. Its decision was based upon an appraisal of the evidence in the light most favorable to the petitioner. However, it found no evidence of negligence on the part of respondent that would support a verdict for the petitioner, " * * nothing whatever in this record to show that it [respondent] did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode."

Accordingly, the petitioner errs in contending in this Court (Br. p. 25) that "the Court of Appeals held that a plaintiff does not make out a *prima facie* case unless he proves his cause of action by a preponderance of the evidence."

Nature of the Case

The action was brought under the Federal Employers' Liability Act (45 U. S. C. §51 *et seq.*) to recover damages for personal injuries sustained by the infant petitioner (hereinafter called "the petitioner") on October 21, 1943 while employed as a machinist-helper in defendant's railroad yards at Jersey City. His father sued for medical expenses and loss of services.

Suit was not commenced until October 17. 1946, three years after the accident and four days before it would have been barred by limitations (45 U. S. C. §56).

Upon the trial petitioner claimed that, while hammering a bolt on the rear lefthand side of a locomotive, pursuant to orders from the mechanic whom he assisted, an explosion occurred which caused metallic fragments to enter and destroy the sight of his left eye. However, it was established by wholly uncontroverted evidence that the metallic fragments in question could not have come from the locomotive.

Petitioner's claim was furthermore in complete conflict with the documentary evidence and undisputed physical facts which established that the accident *could not* have happened as claimed by petitioner. The uncontroverted physical evidence in the case was consistent only with the conclusion that the injuries resulted from the explosion of a small arms cartridge or bullet which petitioner was striking with a hammer and chisel on the breast-beam on the front end of the locomotive.

The Trial Court (Waring, J.) granted respondent's motion for a directed verdict upon the ground that there was "not a shred of testimony" to establish any negligence on the part of respondent (190).

The Court of Appeals for the Second Circuit (L. Hand, Chase and Frank) in a unanimous opinion written by Judge Chase, affirmed the judgment below on the ground that viewing the evidence in the light most favorable to the petitioner, a case of actionable negligence had not been made out, since "there is nothing whatever in this record to show that it [respondent] did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode" (233).

The Evidence

Petitioner's Testimony

The sole witness called by petitioner was the petitioner himself, who was 17 years of age at the time of the accident and over 21 at the time of the trial. His direct testimony covers only 9 pages of the record and his cross examination covers 30 pages.

He was first employed by respondent on February 1, 1943 and had been working as a machinist-helper for a period of several months prior to the occurrence of the accident on October 21, 1943 (13, 14). His signed application for employment with respondent failed to disclose any prior employment (Deft. Ex. A, 194), and upon direct examination he likewise asserted that his first employment was with respondent (13). Upon cross examination he likewise denied any prior employment at first (21) but, when pressed, admitted that he had previously worked for the DeLuxe Theatre on Tremont Avenue in the Bronx "for a few months" (22) although denying that, three months after the accident, he went back to the theatre with a man named Weiss and stole $452.70 from the safe (50). He was also unable to remember ever having worked for Jack Mandel's grocery store in the Bronx (23) even

when confronted with his own prior statement to that effect made on October 27, 1943 (48-49, Deft. Ex. O, 213).

He testified that on the morning of the accident he was working in respondent's Jersey City yards as assistant to Eugene Gigli, a machinist (14). Locomotive 2527 was standing on the track outside the roundhouse (14, 15). This locomotive, he claimed, had been brought in about 9:30 A.M., had steam up, a fire going, smoke coming out the top and "was to go right out again" (15, 48). Upon cross examination, he first admitted that there were canvas and boards on the locomotive but immediately afterwards denied that the cab was covered with canvas and boarded up (48). Despite his insistence that the locomotive had just come in for repairs and was to go right out again, he admitted that it was without engineer, without fireman and without crew (15, 48).

He testified that Gigli told him to start checking *the middle part of the locomotive on the left side* "to see if there are any nuts or bolts loose" (39) and then "went inside the roundhouse to sharpen the chisel" (15). He asserted that the first nut or bolt he checked was loose (32). He claimed that an explosion occurred while he was trying to remove the loose nut by hitting it with a hammer and chisel (16):

> "Q. How did you go about it? A. I went over and got a chisel and I hit it once or twice, and the third time something went off and I didn't know what hit me.
>
> Q. Tell us, do you know whether it was the chisel that went off? A. I don't know what it was.
>
> Q. Was it the bolt that shattered? A. I don't know.
>
> Q. Do you know what it was? A. No.
>
> Q. What was the next thing that you knew? A. I was on the floor unconscious for a few minutes."

After the accident he was taken into the roundhouse where first aid was administered by Dr. Moriarty (17). He was then brought to St. Francis Hospital where his eye was removed the following day, October 22, and where he remained about 10 or 11 days (17, 69, 135).

Petitioner marked on a photograph of the locomotive the location of the bolt which he claimed to have been hammering at the time of the explosion (30-31; Deft. Ex. C, 198). Immediately above the lower arrow and to the right of the third large wheel, the Court will note a small circle which petitioner drew on the photograph to identify the spot. He insisted that no one else was near the scene either at or immediately before the time of the accident and specifically denied the presence of a fellow employee named Gallo (41-43).

Petitioner's Prior Contradictory Version of the Accident

On October 27, 1943, six days after the accident, petitioner was questioned in St. Francis Hospital by Frank A. O'Hare, of respondent's claim department, with respect to the circumstances of the accident (118-119) and the statement made by petitioner at that time was taken down stenographically by a court stenographer, Louis Kabot (93, Deft. Ex. O, 210). It flatly contradicts his testimony upon the trial five years later in three significant respects:

1. *The place of the accident.* Whereas petitioner claimed at the trial that the explosion occurred at the point which he marked with a circle on the photograph of the locomotive (Deft. Ex. C, 198), *he admitted in 1943 that it occurred while he was hammering on the front of the engine* (Deft. Ex. O, 212). A photograph of the front of the locomotive appears in the record as Defendant's Exhibit D (200).

2. *Petitioner's activity at the time.* Whereas petitioner claimed upon the trial that at the time of the explosion he was engaged, pursuant to orders from his supervisor Gigli, in trying to remove a loose nut and bolt from the locomotive at the point circled on Defendant's Exhibit C, *he stated in 1943 that he was engaged in hammering a "nut" on the front end of the engine, "just to smooth it out", because "they come in handy" and that he had not been instructed to do so by anyone* (Deft. Ex. O, 212-213):

"Q. As I get the story, you were hammering, with a chisel and hammer, on the front of the engine, and explosion happened, and you don't know anything at all as to what caused it to happen? A. No.

* * * * *

Q. Why were you hammering on the nut at the time? A. Just to smooth it out.

Q. Just to smooth it out? A. Yes.

Q. You were not told to do that were you? A. No.

* * * * *

Q. The machinist that you were supposed to work with, what is his name? A. His name is Gigli.

Q. He wasn't around at the time the accident happened? A. No.

* * * * *

Q. You were waiting to be told to go to work on another engine? A. I don't know if we were working on another engine or not.

Q. You were just smoothing out a nut? A. Yes, because they come in handy."

3. *The presence of an eye-witness.* Whereas petitioner denied upon the trial that his fellow-employee, Gallo, had been present at or immediately before the time of the accident, *he admitted in 1943 that he had been speaking to Gallo immediately prior to the accident* (Deft. Ex. O, 212).

When confronted with these prior statements completely contradicting his testimony upon the trial, petitioner professed complete inability to remember ever having seen Mr. O'Hare or ever having made the statements referred to (40, 43, 49). In an attempt to minimize the significance of these statements, petitioner's brief before this Court states that "the hospital record contained an order prescribing morphine for plaintiff on October 27, 1943, the day of the interview" (Br. p. 15). This statement is unwarranted. Dr. Connolly, the eye specialist on the staff of St. Francis Hospital, who removed plaintiff's eye at the hospital on October 22, 1943, specifically testified that the order in question was in his own handwriting (135) and that that date opposite the order, also in his own handwriting, was October 22 and not October 27, as suggested by petitioner's trial counsel (136).

Respondent's Evidence

1. The documentary evidence.

Whereas in an attempt to establish a plausible foundation for his version of the explosion, petitioner asserted upon the trial that the locomotive had just come off the line, had a fire in the boiler and steam up, respondent produced *documentary proof that the locomotive had been placed in dead storage on October 9, 1943, twelve days before the accident, and had remained continuously in storage for over a year until October 11, 1944.*

This documentary proof consisted of the Monthly Locomotive Inspection and Repair Reports which respondent was required by law to file with the Interstate Commerce Commission (104-5, Deft. Exs. R and S, 214-16; Federal Boiler Inspection Act, 45 U. S. C. §29). The September 1943 Report, the last report before the locomotive was placed in storage, showed that it was completely inspected on September 15, 1943, and found to be in good operating condition (106, Deft. Ex. S, 216). The October 1943 Report bears the following legend endorsed across its face (First page of Deft. Ex. R, 214):

> "OUT OF SERVICE AT *Jersey City* FROM 10/9/43
> ACCOUNT OF *Stored*
> AND WILL NOT BE USED UNTIL INSPECTION
> IS MADE AND REPORT FILED
> DATED 10/31/1943 AT J. C."

The Reports for the months of November 1943 to September 1944 bear endorsements identical (except as to date) with the October 1943 endorsement. The October 1944 Report shows that the locomotive was not taken out of storage until October 11, 1944 (last page of Deft. Ex. R, 214).

The Reports in question were identified by Jeremiah Driscoll, master mechanic of respondent's yards in Jersey City under whose general supervision both Gigli and the petitioner worked (104-6). Driscoll testified that, as indicated by these Reports, the locomotive was in storage from October 9, 1943 to October 11, 1944 (105) and explained that no one was permitted to work on an engine once it was placed in storage (106-7). He described the condition of the locomotive as follows (104):

"Q. Where was that locomotive located at the time of the accident? A. Why, right outside the east end of the roundhouse, which we call the No. 1 track. That is used for storing locomotives when we have too many of them in service.

Q. Was this particular locomotive in storage on that day? A. She was.

Q. Will you please tell this Court and jury whether there is any canvas or boarding on the cab because of its being stored? A. Yes, it is the standard practice when we store locomotives to close all windows, close the ventilator on the roof, draw the curtains in the back of the cab and board them up, to keep the employees from getting in the cab of the locomotives and taking parts from them.

Q. And that locomotive, on that day at that particular time, did you have any fire in it? A. No sir, absolutely no fire.

Q. Any steam up? A. No steam.

Q. Was it hot? A. No, it had been laying there since the 9th of October, when we put her in storage."

Gigli testified to the same effect (56).

2. The uncontroverted physical evidence.

In addition to the documentary evidence, respondent produced physical evidence establishing the fact that petitioner's injuries did not and could not have resulted from an explosion of the locomotive, as claimed by petitioner upon the trial. This physical evidence consisted of the metallic fragments which had been removed from petitioner's eye and left hand (Deft. Exs. J, K and L, 208). *The uncontroverted testimony showed that the metallic fragments were composed of gilding metal, the primary*

use of which is to make bullet jackets, and that no such metal was used on the locomotive in question.

The uncontroverted testimony of Gerald J. Horwitz, chemical and metallurgical engineer and technical director of the New York Testing Laboratories, which made an analysis and report on the fragments, revealed that they were composed of gilding metal, with a content of approximately 95% copper and 5% zinc (146, Deft. Ex. W, 221). The principal use of gilding metal—aside from cheap jewelry—is to make bullet jackets, the copper colored pointed portion at the top of the shell that encloses the lead core of the projectile (149-50). Gilding metal bullet jackets, of which he analyzed thousands during the war, usually have a content of approximately 95% copper and 5% zinc, *identical with the fragments removed from plaintiff's eye and hand* (154-55; 144). If a small arms cartridge were placed on a locomotive and struck with a hammer and chisel it would explode (157-58). If the gilding metal bullet jacket hit and dented the end of a locomotive tank, it would disintegrate and fragmentize (169).

The uncontroverted testimony of Driscoll, master mechanic in charge of the roundhouse, revealed that no copper, brass or bronze of any kind was used in the locomotive anywhere near the point at which petitioner claimed to have been injured (109, 117) and that there was no indication or evidence whatever of an "explosion", either at that point or on any other part of the locomotive (108-109).

3. The testimony regarding the circumstances of the accident.

Eugene Gigli, machinist, testified that on the morning of the accident the locomotive in question—No. 2527—was standing on the storage track, without fire or steam and

with canvas and boarding in the cab to keep people out, as was customary with locomotives in storage (55-56). Neither he, petitioner, nor anyone else did any work whatever on this stored locomotive either on the day of the accident or at any time during the year it was in storage (56, 59-60). Shortly before the accident Gigli left his tools on the breast-beam at the front end of the stored locomotive and went to the blacksmith's shop to have a wrench repaired, after asking petitioner to watch the tools and to tell the foreman where he had gone (54-55).

About ten minutes later, Gigli learned of the accident and, with the general foreman, went back to the locomotive to see what had happened (57-58). He found his hammer and chisel on the ground by the breast-beam of the locomotive and the other tools still on the breast-beam (56-57) and saw small copper particles all over *the front of the engine by the breast-beam and on his tools* (58). There was a small dent in the tank of the coal tender of another locomotive stored on the track immediately in front of the locomotive in question. Gigli and the general foreman found and removed similar copper particles from this dent (58). Gigli testified as follows to a conversation with petitioner about a month after the accident (58-59):

> "Q. Mr. Gigli, after the accident did Mr. Scocozza at any time ever tell you what he was doing when the explosion occurred? A. Well, a month after he came through the roundhouse and I was working there and I seen him, and I said Hello to him, and I asked him just what happened the day of the accident. He said that he was playing with two inch and a quarter nuts and he said all of a sudden they exploded."

Florentino Gallo, a machinist-helper like petitioner—who, according to petitioner's 1943 version of the accident,

had been speaking to petitioner just before the event—testified as an eye-witness to the accident. He had just come up to where petitioner was standing *at the front end of the engine* and asked petitioner with whom he was working that day (88). The accident occurred as Gallo was standing one or two feet away (89):

> "Q. Now tell us in your own words, as loudly as you can, Mr. Gallo, what happened? A. In the meantime, when I was asking, there was a hammer—
>
> Q. A hammer? A. He was hammering the front of the engine with something. There was something there that looked like a little fuse, something what they put in the lead box, you know, a fuse.
>
> Q. How big was it? A. It was like about that long, like this, see (indicating), and in the meantime when he was hammering it went off, and a blue flame went right front to his face and when it cleared up, and all the blood came out, like down his face, and then the wrist. He said, 'Look what I got', and he put his hand up and the blood ran in the face.
>
> Q. How far do you say you were from him at that time? A. One or two feet away.
>
> Q. That was at the front of this locomotive? A. On the front of the engine.
>
> Q. Did you see anything around the front of the locomotive after the explosion? A. Well, after the explosion, I saw a lot of little pieces like copper, bronze, things like that; you know it was like copper, you know, when the general foreman came back there, and he picked up all them little pieces."

Jeremiah Driscoll, the master mechanic, heard of the accident about a half hour after it occurred and went to the scene to investigate (107). He testified (108):

"I naturally walked around to see if I could find anything that might cause it. They told me there was an explosion there, and I walked around to see if I could find some empty shells, torpedoes or what have you. I looked around, and I think perhaps I would, and I did see them, and they were all very fine fragments of what might be copper, brass, but I did not know what it was.

Q. *Where were they?* A. *Laying right down between the two engines, between the tank of one and the pilot of the other.*

Q. *That would be the front of engine 2527?* A. *That is right, yes.*"

He also observed a dent in the tank of locomotive 2552 which was stored on the same track immediately ahead of locomotive 2527 (107):

"And then on the one up ahead, which is 2552, there was a hole punched in, a dent, which was 1/8th of an inch in the tank, which is as hard as steel itself, and it showed when some object hit that. I don't know what it might have been and there was a dent in that tank that was not originally there.

Q. That was the rear end of the locomotive, immediately in front of the one— A. That is right.

Q. —which Scocozza claims he was working on? A. That is right."

Except for the fine fragments of copper or brass on the ground between the two locomotives, there was no indication or evidence whatever of an "explosion"—either at the point marked by petitioner on the photograph where, upon the trial he claimed the accident occurred (30-31,

Deft. Ex. C, 198), or at any other point on the locomotive (108-109):

"Q. The testimony here, Mr. Driscoll, by the plaintiff, has been that the nut or bolt which he was working on at or near the point of explosion was located where the two arrows are pointing. Did you look at that portion of the locomotive, and, if so, what did you see? A. That portion was not disturbed at all. It was fully intact. There was no occasion for anybody to work on it. In fact, they were prohibited from working on it. That is up on the front end.

Q. Did you look for and did you find any indication of an explosion in that locomotive? A. No, I did not, other than these fragments that I seen around, and I could not determine in my mind just what it was, because it was just a few particles laying around there shining in the black ground. It was so small that you could not pick them up, but they had already taken up all the pieces that they could."

ARGUMENT

POINT I

The Trial Court properly directed a verdict for respondent on the first cause of action. The evidence, when viewed most favorably to the petitioner, was utterly insufficient to support a finding of negligence against respondent.

A. *Petitioner's claim upon the trial.*

Petitioner's claim upon the trial was comprised of three basic contentions:

1. An explosion occurred as he attempted to remove, with hammer and chisel, a loose nut from *a point on the rear lefthand side of the locomotive which motive* (16, 28, 31, 39, Deft. Ex. C, 198).
he marked with a circle on a photograph of the loco-

2. The locomotive on which the explosion occurred *had just come off the line and had steam up* (15, 48).

3. He had been *ordered* to do this work by Gigli, the machinist whom he assisted (39).

Other testimony, wholly uncontroverted in the record, proved the following facts:

4. The metallic fragments from the object which exploded and pierced petitioner's eye and arm (Deft's Exs. J, K and L, 208) were shown by chemical analysis to be composed of a unique substance known as gilding metal having a content of 95% copper and 5% zinc (146, Deft's Ex. W, 221).

5. There was no copper, brass or bronze fixtures anywhere on the locomotive, except for certain brass nuts up in the cab. Below the running boards, all the fixtures were steel (109, 117).

We may assume, for purposes of argument, that the petitioner's uncorroborated testimony created sufficient evidence to present to the jury factual questions as to (1) whether locomotive 2527 had steam up, or whether it was in dead storage at the time of the accident; (2) whether petitioner had been ordered by Gigli to check the nuts and bolts on the left side of the locomotive, or whether Gigli had told him merely to watch the tools; and (3)

whether the explosion occurred when he was attempting, with a hammer and chisel to remove a loose nut on this locomotive, or when he was hammering a bullet on the front breast-beam of the engine.

However, the conceded fact is that the composition of the metallic fragments found in petitioner's eye and arm was gilding metal with a 95% copper content. It is also undisputed that there were no copper or brass fixtures anywheres on the locomotive except some brass nuts up in the cab; and the petitioner has made no claim that at the time of the explosion he was working in the cab of the locomotive. Accordingly, even if the jury could be permitted to find from the evidence that the explosion in fact occurred when the petitioner was attempting with a hammer and chisel to remove a nut upon the left side of the locomotive, there is no reasonable basis in the evidence for a finding that the explosion came from the engine, or that the explosion was in any way caused by an instrumentality under the respondent's control.

It is of course true, as urged by petitioner (Br. p. 18), that

> "Where an employer requires immature and inexperienced workmen to perform duties in places that are dangerous for such immature and inexperienced persons, the employer may be held liable for injuries received by such employees on account of the character of the premises."

In the instant case, however, there is no basis for a contention that respondent's yard was "dangerous" in character or that the injuries sustained by petitioner were attributable to "the character of the premises." The premises in question were merely the *scene* and not the *cause* of the injuries which he sustained.

It is equally true, as further argued by petitioner (Br. p. 19), that respondent owed petitioner

> "• • • a duty not to impose on him tasks that were beyond his powers and the execution of which involved hazards against which petitioner was not capable of protecting himself."

However, in the instant case, there is no basis for a contention that the task which petitioner claims was assigned to him—"to check the locomotive on the left side to see if there are any nuts or bolts loose" (39)—was "beyond his powers" or involved "hazards against which petitioner was not capable of protecting himself."

Again, in the instant case, there is no basis for a contention that respondent required petitioner to perform a task which it knew or should have known exposed him to "latent dangers." There is not a scintilla of evidence to show that that task to which petitioner claimed to have been assigned—"to check the locomotive on the left side to see if there are any nuts or bolts loose" (39)—involved the slightest element of danger, latent or obvious. Upon the trial petitioner made no attempt whatever to support the groundless allegations of his complaint that respondent negligently "failed to supply the said infant-petitioner with suitable and safe materials and appliances"; that respondent was negligent "in failing to keep the materials and appliances in repair" and in "failing to furnish the infant-plaintiff with a safe and proper location with which to do his work"; that "the engine about which the infant-plaintiff was engaged in discharging his duties, was out of repair, defective and dangerous" and that he was "struck by an object from said engine" (Complaint, Par. Eleventh, 5).

In fact, at the very end of the trial, two short portions of the petitioner's sworn pre-trial deposition were read into evidence. In response to questions, he admitted that when he started hammering on the engine, he did not see any defective part in front of him. He also characterized the place he was working at the time of the accident as "a safe place" to work (177).

We recognize that the rule of this Court in regard to the sufficiency of evidence to present a question of fact as to negligence in actions arising under the Federal Employers' Liability Act, stems from such authorities as *Jones* v. *East Tennessee V. & G. R. Co.*, 128 U. S. 443, and *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554. Succinctly stated, questions of negligence must be submitted to the jury "* * * if evidence might justify a finding either way on those issues". *Wilkerson* v. *McCarthy*, 336 U. S. 53, 55. In other words, if fair-minded men might honestly draw different conclusions from the evidence, the issues must be resolved by the jury. *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 353; *Washington & G. R. Co.* v. *McDade* (*supra*), p. 571-2. The rule was well summarized by a unanimous Court in *Myers* v. *Reading Co.*, 331 U. S. 477, 485:

> "The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict."

Under the terms of this requirement, the Trial Court had "* * * the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based." It was its function "* * * to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view of the evidence most

favorable to the plaintiff." *Wilkerson* v. *McCarthy* (*supra*), pp. 64-65. [Frankfurter, J., concurring.]

We believe that the evidence so viewed cannot rationally support a verdict for the petitioner based upon a finding of negligence against respondent. Without weighing the credibility of petitioner's testimony, "there can be but one reasonable conclusion as to the verdict" in this case (*Brady* v. *Southern Railway Co.*, 320 U. S. 476, 479). In view of the uncontradicted testimony that the metallic fragments taken from petitioner's eye and arm were gilding metal with a 95% copper content, and that there was no copper whatsoever on the locomotive, with the exception of brass nuts up in the cab, no fair-minded jury could reasonably infer that the petitioner's injuries were caused by an explosion from the engine. The only reasonable inference that may be drawn from the entire record is that the petitioner's injuries were caused by the explosion of a bullet which he hit with hammer and chisel on the front breast-beam of the locomotive.

A unanimous Court of Appeals, after a full review of this record, concluded that the evidence, when viewed in the light most favorable to the petitioner, was utterly insufficient to sustain a recovery for him. That Court assumed, for purposes of argument, that the jury might have found the petitioner's version of the accident to be correct. Yet, a verdict for the petitioner based thereon, would have been without support in law, for the respondent, in the exercise of reasonable care, could not have foreseen any likelihood that such an explosion as described by the petitioner might occur. As the Court succinctly stated:

> "The defendant railroad was not an insurer, and there is nothing whatever in this record to show that it did, or should, have had even the slightest intimation

that hitting the nuts on this engine would cause anything to explode" (233).

The respondent's obligation to the petitioner was not such as to impose liability regardless of due care, and regardless whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of any act, or failure to act, on respondent's part. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 483; *Wolfe* v. *Henwood*, 162 F. (2d) 998, 1000 (C. C. A. 8), cert. den. 332 U. S. 773. As the Court of Appeals for the Third Circuit recently stated in *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. (2d) 996, 999, aff'd 335 U. S. 329:

> "For a man to be charged with negligence in failing to take precautions there must be some danger towards which these precautions should be directed."

B. *Petitioner's change of theory in this Court.*

On pages 17 and 18 of petitioner's brief, it is asserted that "petitioner's proof" shows eight "facts with regard to respondent's negligence". The first four "facts" require little comment. No. 1: It is true that petitioner was two months short of 17 years of age at the time of the accident and, after completing four years of high school, had only one or two prior jobs (12, 22-23, Deft. Ex. A, 194). No. 2: It is true that a large number of locomotives came each day for repairs at the yards where petitioner worked. No. 3-4: It is true that petitioner had been employed by respondent for a period of nine months, first in the coal pit, next as a locomotive lubricator and then as a machinist-helper for several months prior to the accident (13-14); that he had been furnished with an individual copy of respondent's book of Safety Rules and

required to have a thorough knowledge of them (Deft. Exs. H and I, 204, 205); and that Gigli had instructed him in the use of tools and cautioned him against using them in an improper manner (52, 53, 62). Manifestly, none of the first four "facts", either individually or collectively, involved any element of negligence on the part of respondent.

It is upon the next four "facts", allegedly established by "petitioner's proof", that the present claim of negligence is founded. It is based upon (a) an *incomplete* statement of petitioner's testimony as to items 5 and 6 and (b) a *distortion* of petitioner's testimony as to item 8. Both the incomplete statement and the subsequent distortion are essential to avoid explicit recognition of the precise claim which petitioner actually made upon the trial.

The incomplete statement of petitioner's testimony is the assertion made in items 5 and 6 that "petitioner's proof" showed that "Gigli, on the day of the accident, *ordered him to work alone on a locomotive that required immediate repairs* (39, 41)" and left petitioner alone while he "was engaged in that work". Assuming for the moment that this testimony had not been shown to be false by the documentary evidence, it is important to note exactly what petitioner, upon the trial, actually claimed Gigli had "ordered" him to do. Petitioner's testimony in this connection, regardless of its truth, was emphatic and specific (39):

> "Q. Speak loudly now. A. He said he was going to grind down the chisel and he told me to *check the locomotive on the left side* to see if there are any nuts or bolts loose.
>
> * * * * *

Q. Did he tell you where to start checking the nuts on the locomotive? A. *The middle part of the locomotive.*

Q. *To start in the middle?* A. *Yes.*

Q. What side did he tell you to start on. A. The left side."

The distortion occurs with the assertion under item 8 that "petitioner's proof" showed that "* * * *while he was working on the left front of the engine,* an explosion occurred, causing the injury complained of (16, 32, 33, 34)". *This statement is directly contrary to petitioner's sworn testimony upon the trial. Upon the trial, petitioner swore that the accident occurred as he was attempting to remove a loose nut and bolt from a point near the rear lefthand side of the locomotive which he carefully marked with a circle and two arrows on a photograph of the locomotive* (31, Deft. Ex. C, 198). It was, he swore, the first nut or bolt which he checked (32). At no point in the petition or supporting brief is this exhibit even alluded to.

Petitioner's actual testimony upon the trial was carefully considered and consistent within itself. Confronted with the necessity of proof that he was engaged in the pursuit of his duties at the time of the accident, he first asserted that he had been *ordered* by Gigli to check the nuts and bolts at the middle of the lefthand side of the locomotive. Then to show that *the injuries actually resulted from his execution of this order,* he asserted that the explosion occurred as he was carrying out this alleged order and attempting to remove a loose nut and bolt from the very point on the locomotive he had been told to check.

Upon the trial, it was established by uncontrovertible proof that petitioner's testimony as to the place and manner in which the accident occurred could not be true.

So conclusive was the demonstration that the petition and supporting brief before this Court wholly ignores his sworn testimony that the explosion occurred at the rear lefthand side of the locomotive at the point he marked on the photograph. Instead, it is asserted that "petitioner's proof" showed that he was injured at *"the left front of the engine"*— the very thing that petitioner denied under oath and which respondent itself succeeded in establishing by its own conclusive proof.

Petitioner cannot now repudiate in this Court his own sworn testimony upon the trial and abandon the very theory upon which his entire case was tried. In his complaint he specifically alleged that the locomotive in question "was out of repair, defective and dangerous to persons working on it" (5). Upon the trial he physically marked on a photograph the exact point on the locomotive at which he claimed to have been working when injured (Deft. Ex. C, 198). In his testimony he swore that the explosion occurred as he attempted to remove, with hammer and chisel, a loose bolt or nut from this precise point (16, 28, 31, 39). Even after respondent presented conclusive evidence that petitioner's testimony could not be true, he did not take the stand again to alter or qualify his original testimony in any way. When respondent's motion for a directed verdict was made, it was still petitioner's unequivocal position that his injuries had not, in fact, been sustained as he hit some unidentified object on the breastbeam at the front of the locomotive, but that he had been injured as the result of an explosion which occurred as he was seeking to remove a loose bolt or nut from a point on the rear lefthand side of the locomotive.

Petitioner cannot now contend that the Trial Court should have allowed the jury to infer negligence on the part of the respondent from the fact that an object which

petitioner hit with hammer and chisel on the breast-beam at the front of the locomotive exploded when struck. No such negligence was claimed by petitioner on the trial and any such claim would have been utterly contrary to the contention actually made by him. Petitioner's sworn testimony was that an explosion occurred as he was attempting to remove a loose nut or bolt from the rear left-hand side of the locomotive—not that he hit and exploded a bullet or similar object on the breast-beam at the front of the locomotive. At no time upon the trial did petitioner claim or attempt to prove that anyone had placed or left a bullet or similar explosive on the breast-beam of the locomotive, or that respondent knew or should have known of the existence of such an object. No such question was raised upon the trial and any such contention would have been wholly contrary to petitioner's own sworn testimony. Petitioner cannot disavow the theory upon which he proceeded below and seek reversal of the judgment of the Trial Court on the basis of a wholly new and inconsistent theory advanced for the first time on appeal. *Horne* v. *George H. Hammond Co.*, 71 Fed. 314 (C. C. A. 1), rev'd on other grounds 155 U. S. 393; *Lesser Cotton Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 142-3 (C. C. A. 8); *Illinois Central R. Co.* v. *Egan*, 203 Fed. 937, 939 (C. C. A. 8); *Van Norden* v. *Chas. R. McCormick Lumber Co.*, 17 F. (2d) 568, 570 (C. C. A. 9), cert. den. 274 U. S. 758; *Baldi* v. *Ambrogi*, 89 F. (2d) 845, 846 (Ct. App. D. C.).

C. *Petitioner's present contention that respondent's explanation of the accident was not "conclusive".*

In petitioner's brief before this Court it is urged (pp. 21-23) that respondent did not *conclusively* prove that the object which petitioner was hammering on the breast-beam

at the front of the locomotive was a *bullet.* No such obligation devolved upon respondent. The question before the Trial Court was not whether respondent had conclusively proved the precise manner in which petitioner's injuries were actually sustained, *but whether there was any evidence to support a verdict based upon petitioner's version of the accident.*

Although not required to do so, respondent went forward and produced uncontroverted evidence, consistent only with the conclusion that the actual cause of petitioner's injuries was a bullet exploded by him with hammer and chisel on the breast-beam of the locomotive. The undisputed evidence is that a "little" object which petitioner was hammering on the front of the engine "went off" (89); that immediately afterwards a dent about 1/8th of an inch deep was found in the steel tank at the rear of another locomotive standing on the same track, immediately in front of the locomotive in question (58, 107-108); that copper colored metallic fragments were found in the dent, on the ground between the two locomotives, and on the breast-beam of the locomotive in question (58, 89-90, 108-109); that the metallic fragments removed from petitioner's eye were of a unique substance known as gilding metal with a 95% copper and a 5% zinc content, the precise metal used for the manufacture of bullet jackets (the copper colored tip encasing the lead core of the projectile) (146, 150, 154-55); that if a small arms cartridge were placed on a locomotive and struck with a hammer and chisel it would explode (157-58); and that if the gilding metal bullet jacket hit and dented the tank of a nearby locomotive it would disintegrate and fragmentize (169).

In urging that the foregoing uncontroverted evidence was not "conclusive", petitioner errs in stating (Br. p. 21)

that "* * * respondent's theory seems to assume that petitioner was hammering on engine 2552—in which a dent was found after the accident * * * whereas the testimony both of petitioner and of Gallo is that petitioner was hammering on Engine 2527". Respondent has never suggested that petitioner was hammering on locomotive 2552. The bullet was hammered on the breast-beam of 2527. As it exploded, it struck and dented the tank at the rear end of locomotive 2552, which stood immediately ahead on the same track. Petitioner similarly errs in stating that "respondent's theory would require the Court to believe that the solid top of a bullet would not only mushroom upon striking an object but would also shatter into fragments." It was not the solid lead core of the bullet which shattered into fragments but the thin *gilding metal bullet jacket* which encased the lead core of the projectile (150, 169; See Deft. Exs. X, Y and Z). Again, in referring to the absence of powder burns, petitioner overlooks the medical testimony that whether or not powder burns would probably result would depend upon the direction in which the shell was pointing when exploded (83). Petitioner's quotation from *American Mfg. Co.* v. *Zulkowski* (185 Fed. 42), in support of his contention as to the "improbability" of so foolhardy an act, is to be contrasted with the earlier assertion in his brief (pp. 17-18) that "petitioner's proof shows * * * [a] youthful propensity for mischief."

POINT II

The Trial Court properly directed a verdict for respondent on the second cause of action.

The petitioner, Ermino Scocozza, father of the petitioner, Anthony Scocozza, sued the respondent to recover the sum of $5,000.00 for loss of services and medical expenses incurred on behalf of his infant son (6).

The Trial Court properly directed a verdict for respondent on this second alleged cause of action, for it is well-settled in this Court that the Federal Employer's Liability Act is comprehensive and exclusive and takes away any common law right of a parent to recover for such medical expenses and loss of services.

In *New York Central & Hudson River R. R. Co.* v. *Tonsellito,* 244 U. S. 360, a decision whose authority has never been questioned, this Court unanimously reversed a judgment for loss of services and medical expenses recovered by a father whose son had recovered a judgment for personal injuries under the Federal Employers' Liability Act. This Court held (pp. 361-2):

> "The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York Central R.R. Co.* v. *Winfield ante,* 147, and *Erie Railroad Co.* v. *Winfield ante,* 170. There we held the act 'is comprehensive and, also, exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regula-

tion which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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